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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 542.

THE CITY OF YONKERS, *Petitioner*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 543.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, *Petitioners*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, *Petitioners*,

v.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation, *Respondent*.

No. 545.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund," *Petitioner*,

v.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York, *Respondent*.

BRIEF OF RESPONDENT.

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No. 544.

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, *Petitioners*,

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v.

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York, *Respondent*.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASES.

These are suits brought by the receiver (respondent herein) of the First National Bank and Trust Company

of Yonkers, New York, to recover from petitioners, as depositors in the bank, sums of money alleged by the receiver to have been illegally paid to petitioners while the bank was closed by virtue of the Banking Holiday of 1933 and subsequent thereto while the bank was in conservatorship. The payments were made in reliance upon the erroneous assumption that a pledge of assets given by the bank to secure repayment of said deposits was valid. The receiver contended that the payments thus erroneously made could be recovered to the extent that such payments exceeded the *pro rata* distribution made to the other depositors.

The judgments of the trial court, directing repayment to the receiver of the principal amounts of the illegal payments, plus interest, (R. 197 in No. 542, R. 142 in No. 543, R. 138 in No. 554, R. 103 in No. 545) were affirmed by the Circuit Court of Appeals (R. 235 in No. 542, R. 182 in No. 543, R. 177 in No. 554, R. 138 in No. 545).

The bank last did an unrestricted banking business on March 3, 1933 (R. 31-33).* It did not reopen for business on March 4, 1933, inasmuch as the Governor of the State of New York had proclaimed a State Banking Holiday taking effect on that date (R. 85). March 5th was Sunday, and the bank thereafter remained closed by virtue of the President's Proclamations declaring a nation wide Banking Holiday effective March 6, 1933. On March 9, 1933, Congress by enactment ratified the President's proclamation (U. S. C., title 12, sec. 95b). **The bank never thereafter reopened** (R. 33). It failed to obtain a license to reopen on March 15, 1933, the date on which sound banks in Yonkers, and other cities of that class, were licensed to resume unrestricted business. A conservator for the bank was appointed on March 20, 1933, (R. 81) and it remained in conservatorship until January 23, 1934, on which date a receiver was appointed, (R. 83). The subsequent liquidation of the bank was upon the premise that the rights of all depositors, creditors and stockholders became fixed as of the close of business on March 3, 1933; and in consequence

*All record references are to case No. 542, except where otherwise indicated.

thereof interest on deposits, claims against the receivership, and the allowance of offsets, have been determined and resolved as of that date (R. 49). Two dividends have been paid to the bank's general creditors,—40 per cent on December 16, 1933, and 10 per cent on November 3, 1937, (R. 30).

On March 3, 1933, the petitioner in No. 542—The City of Yonkers—had deposit balances in the bank totaling $277,230.25, (R. 94, 141, 142, 164, 165, in No. 542). The petitioners in No. 543—The Board of Trustees of the Police Pension Fund—had deposit balances in the bank totaling $29,283.67, (R. 119 in No. 543). The petitioners in No. 544—The Board of Trustees of the Firemen's Pension Fund—had deposit balances in the bank totaling $16,590.75, (R. 117 in No. 544). The petitioner in No. 545—The City of Yonkers as Trustee for "The Saunders Trade School Fund"—had deposit balances totaling $4,971.38, (R. 77 in No. 545). Prior to the bank's suspension it had illegally attempted to pledge its assets—of a par value of $535,000.00—as security for all of said deposits as constituting public money of the City of Yonkers. (The illegality of the pledge is, in effect, conceded by petitioners; see discussion herein, *infra*, p. 7). These assets remained in the bank's safe deposit boxes under the dual control of the bank and the City until after the conservator was appointed. The City never had exclusive control of the assets (R. 74). After he assumed charge of the bank's affairs the conservator, acting illegally, but on the assumption the City was a secured depositor, (1) recognized rights of the City in the bank's assets contained in said safe deposit boxes, (2) paid the deposit balances of the City in full, except the sum of $126.49, and (3) failed to recoup from the sums due the City on a pro rata basis the illegal payments made by the bank between March 8, 1933 and the date of the conservator's appointment.

Petitioners, in their statement of the case, say (Pet. Brief, p. 8):

> "If the law as laid down by the New York State courts governed the consequences of the pledge either

by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

"If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid the City when he paid out the deposits in full and recovered the pledged securities."

The foregoing statement constitutes the basis of discussion in "Point I" of petitioners' argument (Pet. Brief, pp. 11-15; 17-29).

In their statement of the case petitioners also say (Pet. Brief, p. 8):

> "Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could not recover without proof that the payments by the Bank were made after the commission of an act of insolvency, or in contemplation of an act of insolvency, and proof that the payments were made with the intent to prefer the City over other creditors."

The foregoing statement constitutes the basis of discussion in petitioners' "Point II" of their argument (Pet. Brief, pp. 16-17; 29-33).

As hereinafter pointed out (*infra* p. 7) petitioners concede that the pledge of assets to secure repayment of the deposits was *ultra vires*. Consequently, with this factor eliminated from the issues pending in this Court, the questions now presented are correctly set forth on page 2 of petitioners' brief:

> "1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit of public funds is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

"2. Whether payments made by a bank to a depositor in accordance with the Presidential Proclamation after the banking holiday of March 6, 1933, but before the bank was taken over by the Comptroller of the Currency, can be recovered as preferential without any proof that the payments were made after the commission of an act of insolvency or in contemplation of an act of insolvency, or proof that the payments were made with the intent of creating a preference."

SUMMARY OF ARGUMENT.

I.

The petitioners were not entitled to hold the security until their deposits were repaid in full, inasmuch as the pledge of assets constituting such security was ultra vires, illegal and void. Therefore, the receiver of the National Bank was entitled to recover the payments made to the petitioners in reliance upon the erroneous assumption that the pledge of assets was valid.

(A). The pledge by the bank to secure the petitioners' deposits was ultra vires, illegal and void and payments erroneously made to redeem the security may be recovered.

(B). The policy and provisions of the National Bank Act control the consequences of the pledge, and not the common law of New York.

(C). The New York law as to the consequences of the pledge was not incorporated in the National Bank Act by reference.

(D). The New York decisions are to the effect that the New York courts should follow the decisions of the Supreme Court of the United States in the interpretation and construction of Federal statutes and Federal policies thereunder implied including the national banking statutes and decisions construing the same.

II.

All payments made by the bank to the petitioners during the banking holiday and prior to the appointment of the conservator were illegal and were recoverable by the receiver because they constituted preferential payments prohibited by the National Banking laws and further because said payments were not authorized under the President's proclamations and the regulations issued thereunder.

(A). The payments by the bank to the petitioners between March 8th and March 18, 1933, were in violation of Section 5242 of the Revised Statutes (U. S. C. title 12, sec. 91).

(B). The payments made by the bank to the petitioners between March 8th and March 18, 1933, were not authorized under the President's Proclamations and the regulations issued thereunder.

ARGUMENT.

I.

REPLY TO "POINT I" OF PETITIONERS' ARGUMENT.

Preliminary Statement.

Petitioners, in their brief, have, for the purpose of simplicity and convenience in developing the argument under their "Point I," treated the questions and issues concerning the City's deposits as controlling the situation involving the three other deposits. We shall follow the same method in the discussion constituting our reply thereto.

THE CITY WAS NOT ENTITLED TO HOLD THE SECURITY UNTIL ITS DEPOSITS WERE REPAID IN FULL, INASMUCH AS THE PLEDGE OF ASSETS CONSTITUTING SUCH SECURITY WAS ULTRA VIRES, ILLEGAL AND VOID. THEREFORE, THE RECEIVER WAS ENTITLED TO RECOVER THE PAYMENTS MADE TO THE CITY IN RELIANCE UPON THE ERRONEOUS ASSUMPTION THAT THE PLEDGE OF ASSETS WAS VALID.

(A) The Pledge by the Bank to Secure the City's Deposits was Ultra Vires, Illegal and Void, and Payments Erroneously Made to Redeem the Security May be Recovered.

The courts below held (R. 194, 228-229) and the petitioners concede in their brief here, (Brief, pp. 2, 10, 11, 18, 20) that the pledge securing the City's deposits was *ultra vires*. Petitioners also made such concession in the Circuit Court of Appeals (R. 229). The reasoning supporting this position may here be briefly summarized preliminary to, and as a primary basis for, the subsequent discussion of the issues now before this Court.

The Act of June 25, 1930, (c. 604, 46 Stat. 809, U. S. C. title 12, sec. 90) hereinafter designated, for convenience, as

the "Enabling Amendment," authorized, for the first time, national banks to secure deposits of public funds of a state, or of any political subdivision thereof, where the banks were located in states in which state banks possessed such power. *Marion* v. *Sneeden*, (1934) 291 U. S. 262, 268-9. The Enabling Amendment provides as follows:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

Consequently, the *initial* question in the courts below was whether the state of New York had conferred upon banks organized under its law, the power to give security for deposits of the petitioners. See, by analogy: *Marion* v. *Sneeden, supra*, p. 266; *Lewis* v. *Fidelity Co.*, (1934) 292 U. S. 559, 564; *McNair* v. *Knott*, (1937) 302 U. S. 369, 371. That question could only be authoritatively answered by either state statutory authority or by the decisions of the highest court of the state holding that such power existed in the state banks. *Marion* v. *Sneeden, supra*, pp. 269, 271. Neither form of such authority existed so far as the security given to cover the deposits involved in the present litigation is concerned, and therefore the pledge was *ultra vires*. *State Bank of Commerce* v. *Stone*, (1933) 261 N. Y. 175; *City of Mount Vernon* v. *Mount Vernon Trust Co.*, (1936) 270 N. Y. 400.

The federal courts have held that such an unauthorized pledge by a national bank is not only *ultra vires*, but is illegal and void, that the intended pledgee acquires no title or right in the pledged security, and that the same remains the asset of the bank; and further, that no rights accrue in favor of the pledgee from such illegal pledge. In this connection this Court stated in *Texas & Pacific Ry.* v. *Pottorff*, (1934) 291 U. S. 245, 260-261:

"The receiver is not estopped to deny the validity of the pledge. The Railway's argument is that the bank could not set up the defence of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. The bank itself could have set aside this transaction. It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24. But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. The unauthorized pledge reduced the assets available to the general creditors. It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so."

In *Central Transp. Co.* v. *Pullman's Car Co.*, (1891) 139 U. S. 24, this Court stated (at p. 59):

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, *is not voidable only, but wholly void, and of no legal effect.* The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." (Italics inserted)

In addition to the foregoing decisions may be noted the cases next cited, holding:

(a) such unauthorized pledges are void:

LaParr v. *City of Rockford, Ill.*, (C. C. A. 7th, 1938) 100 F. (2d) 564, 566 *cert.* denied (1939) 307 U. S. 624; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied (1938) 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938) 94 F. (2d) 257, 258; *City of Fort Worth* v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, *cert.* denied (1938) 304 U. S. 571; *Queenan* v. *Mays*, (C. C. A. 10th, 1937) 90 F. (2d) 525, 533, *cert.* denied (1937) 302 U. S. 724; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 23, 24, *cert.* denied (1938) 303 U. S. 653; *City of Chicago* v. *Joseph*, (C. C. A. 7th, 1938) 95 F. (2d) 444, 446, 447, *cert.* denied (1938) 304 U. S. 578; *Illinois Cent. R. Co.* v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, 149, *cert.* denied (1934) 291 U. S. 668; *Baltimore & O. R. Co.* v. *Smith*, (C. C. A. 3rd, 1932) 56 F. (2d) 799, 801;

(b) unless validated prior to closing of the National bank by subsequent legislation as in:

McNair v. *Knott*, (1937) 302 U. S. 369-371; *cf. Lewis* v. *Fidelity Co.*, (1934) 292 U. S. 559, 570;

(c) because their consummation would contravene the provisions of the National Bank Act forbidding preferences and requiring a ratable distribution to all of the bank's creditors. An *ultra vires* and void pledge cannot be legalized or validated once the bank has closed and the interests of other creditors have become fixed:

City of Fort Worth v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, 969, *cert.* denied (1938) 304 U. S. 571; *Webb* v. *American Surety Co. of New York*, (C. C. A. 5th, 1937) 88 F. (2d) 171, 174; *Ross* v. *Lee*, (S. D. Fla. 1936) 15 F. Supp. 972, 973;

(d) such a pledge cannot be made enforceable by any doctrine of estoppel:

LaParr v. *City of Rockford, Ill.*, (C. C. A. 7th, 1938) 100 F. (2d) 564, 568, *cert.* denied (1939) 307 U. S. 624; *Granzow* v. *Village of Lyons, Ill.*, (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *Adams* v. *Cribbis*, (D. Colo. 1936) 17 F. Supp. 723, 725.

The receiver of an insolvent national bank is an administrative officer of the United States. *In re Chetwood*, (1897) 165 U. S. 443, 458; *United States* v. *Weitzel*, (1918) 246 U. S. 533, 541; *Steele* v. *Randall*, (C. C. A. 8th, 1927) 19 F. (2d) 40, 42; *Liberty Nat. Bank* v. *McIntosh*, (C. C. A. 4th, 1927) 16 F. (2d) 906, 909; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29; *Cooper* v. *O'Connor*, (D. C. App. 1938) 99 F. (2d) 135, 139; *Cooper* v. *O'Connor*, (D. C. App. 1939) 105 F. (2d) 761, 763.

Payments voluntarily made by national bank receivers and other officers of the United States under a mistake of law may be recovered. *Wisconsin Central Rd.* v. *United States*, (1896) 164 U. S. 190, 212; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 24, *cert.* denied (1938) 303 U. S. 653; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied (1938) 303 U. S. 661; *Granzow* v. *Village of Lyons, Ill.*, (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938) 94 F. (2d) 257, 259; *O'Connor* v. *Rhodes*, (D. C. App. 1935) 79 F. (2d) 146, 152; *Inland Waterways Corporation* v. *Hardee*, (D. C. App. 1938) 100 F. (2d) 678, 685, 688, 690.

(B) The Policy and Provisions of the National Bank Act Control the Consequences of the Pledge, and Not the Common Law of New York.

Petitioners concede (Pet. Brief pp. 11, 18) that under the federal decisions, assets illegally pledged by a national bank to secure deposits of the kind here in question may be recovered by the receiver of the bank without first making

repayment of the deposit (citing, *inter alia, Texas and Pacific Ry.* v. *Pottorff, supra*). Petitioners further state (Pet. Brief pp. 11, 18), that in New York a pledge by a state bank to secure deposits of the type here involved is *ultra vires*, but the security can not be recovered without first making repayment of the deposit (citing, *inter alia, State Bank of Commerce* v. *Stone, supra*). Petitioners also state in this connection (Pet. Brief pp. 11, 18) that the position of the City is that the New York law fixes the consequences of such a pledge made by a national bank in New York "because there is no federal statute law on the subject and there is no federal common law." (Citing *Erie R. Co.* v. *Tompkins*, (1938) 304 U. S. 64).

Respondents' reply to this position is, in brief, that the absence of any provision in the Enabling Amendment with respect to the *effect* or consequences of an unauthorized and illegal pledge by a national bank does not permit the law of the State of New York to *complement* the Enabling Amendment and to thereby govern the consequences of an *ultra vires* pledge made by a national bank and that petitioners' contentions in this respect are contrary to the clearly indicated policies implicit in the provisions of the national banking laws.

To the effect that a state can not, even by statute, much less by its common law, supplement or complement the national banking law so as to supply consequences or effects not specifically provided for or intended by the federal statute, see *Easton* v. *Iowa*, (1903) 188 U. S. 220, 236-37, where this court said:

> "A leading case in which this court had occasion to consider the limitation of legislation by a State affecting a subject within the scope of action by Congress is that of *Prigg* v. *Pennsylvania*, 16 Pet. 539, from which we quote the following observations:
>
> "'If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot

be that state legislatures have a right to interfere, and, as it were, *by way of complement to the legislation of Congress, to prescribe additional regulations,* and what they may deem auxiliary provisions for the same purpose. In such case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.' " (Italics inserted)

See also *Prigg* v. *Pennsylvania*, (1842), 16 Peters 539, 617-19.

We invite attention particularly to those so-called winding up provisions which govern the liquidation of insolvent national banks;—Section 5234 of the Revised Statutes (U. S. C., title 12, sec. 192); Section 5236 of the Revised Statutes (U. S. C., title 12, sec. 194); Section 5242 of the Revised Statutes (U. S. C., title 12, sec. 91). These, as well as other provisions in the National Bank Act, constitute "a complete system for the establishment and government of national banks * * *, the winding up of the institutions and the distribution of their effects." *Cook County Nat. Bank* v. *United States*, (1882) 107 U. S. 445, 448; *Easton* v. *Iowa, supra.*

The case of *Erie R. Co.* v. *Tompkins*, (1938) 304 U. S. 64, relied upon by petitioner as requiring the New York law to be applied in determining the effect of the *ultra vires* pledge, is of no assistance to the petitioners here because, as above indicated, the national banking laws, as construed by the federal decisions, establish a federal policy governing national banks, including the pledge of their assets to secure deposits and the effect of illegal pledges. Consequently, the doctrines of the *Erie Railroad* case require the application of this federal policy rather than the policy indicated by the New York decisions. A discussion of this case will be helpful in determining its application here.

In *Erie R. Co. v. Tompkins, supra,* this Court, in a personal injury action originally brought in the federal court upon the jurisdictional basis of diversity of citizenship, had before it for reconsideration Section 34 of the Federal Judiciary Act of 1789 (U. S. C., title 28, sec. 725), frequently referred to as the Rules of Decision Act. This Act provides as follows:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In deciding *Erie R. Co.* v. *Tompkins, supra,* this Court disapproved the doctrine previously recognized under *Swift* v. *Tyson,* (1842) 16 Peters 1, and in addition this Court broadened the construction of the word "laws" in Section 34 of the Federal Judiciary Act of 1789 so as to embrace the case law as well as the statutory law of the states. Mr. Justice Brandeis stated the new doctrine as follows (at page 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal *general* common law." (Italics inserted.)

While the federal jurisdiction in *Erie R. Co.* v. *Tompkins, supra,* rested on diversity of citizenship, the federal jurisdiction in the instant cases rests upon the fact that these are cases for the winding up of the affairs of a national banking association. Section 563 of the Revised Statutes (U. S. C., title 28, sec. 41 (16)).

In a decision handed down the same day as the *Erie Railroad Co.* case, Mr. Justice Brandeis, in the case of

Hinderlider v. *LaPlata Co.*, (1938) 304 U. S. 92, stated (at page 110):

> "* * * For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive. * * * Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions."

Thus, in the *Erie R. Co.* v. *Tompkins* case, this court stated that there is no federal *general* common law, and in the *Hinderlider* case, on the same day, stated there is a federal common law. The fact that the *Erie Railroad* case and the *Hinderlider* case were decided the same day clearly indicates that conflicting doctrines were not intended, and that this Court recognized that there always has been and still is a *special* federal common law operating in fields occupied by Congress, such as Interstate Commerce, Patent Law, Federal Taxation, Bankruptcy Law, and the Liquidation of National Banks. See: *Schulman, The Demise of Swift* v. *Tyson*, 47 Yale Law Journal 1336, 1350.

This is pointed out again in the decision of this Court handed down on December 18, 1939, in the case of *Board of County Commissioners* v. *United States*, No. 14, October Term 1939, 84 L. Ed. 233. This was a suit by the United States to recover taxes on behalf of an Indian. The taxes had been levied upon land in Kansas from 1919 to 1935, during which time the Indian held the land under a fee simple patent. Previously, the Government held the land under a trust patent for the benefit of the Indian. The fee patent for the land was canceled in 1935 and the suit begun. The District Court rendered judgment for the Government and the Circuit Court of Appeals affirmed. Certiorari was granted on the question of the Government's right to interest before judgment. Under the Kansas law, it is settled that a taxpayer may not recover interest from a county for

taxes wrongfully collected. The federal statutes upon which the suit was grounded contain no provisions regarding interest. A judicial rule regarding interest in that particular kind of case had not yet been formulated by this Court. The question was new. This Court modified the judgment below so as to exclude interest, stating that under its own doctrines of equity controlling the recovery of interest by the Government in analogous situations, it did not consider that interest should be charged. The opinion stated (at page 235):

> "The starting point for relief in this case is the Treaty of 1861, exempting M-Ko-Quah-Wah's property from taxation. Effectuation of the exemption is, of course, entirely within congressional control. *But Congress has not specifically provided for the present contingency, that is, the nature and extent of relief in case loss is suffered through denial of exemption.* It has left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the lawmaking agencies of Kansas. *Cf. Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487." (Italics inserted.)

According to our interpretation of this decision, it is reasonable to assume that the rule therein formulated, forbidding the recovery of interest on taxes improperly paid in connection with Indian land, now controls tax refunds among all the states no matter what the local law is as determined by the state courts. Likewise it seems reasonable to assume that the Supreme Court rule laid down in 1934 in the *Pottorff* and *Sneeden* cases,—that an illegally secured depositor of a national bank is not entitled to a refund in full of the deposit as a condition precedent to recovery by the receiver of the assets illegally pledged, and that such depositor has no greater rights than a general creditor,—now controls in similar cases in each state, no

matter what the local law may be. Inasmuch as the pledge involved in the instant case is *ultra vires* and void, the petitioners belong to the general creditor class.

It is recognized that under the decision in *Erie R. Co.* v. *Tompkins, supra,* the Federal courts are now required to give the same effect to state common law as they were heretofore required to give to a state statute. Consequently, the questions raised by petitioners under Point I of their brief may be solved by inquiring into the effect of state statutes on national banks.

This Court has held time and again that state statutes *inconsistent* with the policy or provisions expressly indicated in, or reasonably implied from, the National Bank Act, are inapplicable to national banks. In *Jennings* v. *U. S. F. & G. Co.*, (1935) 294 U. S. 216, this Court in considering whether an Indiana statute controlled a national bank in Indiana said (at page 219):

> "There was in force in Indiana in 1931 a statute known as the Bank Collection Code (Indiana Acts, 1929, c. 164), which is applicable to national banks in so far as it is consistent with the policy or provisions, express or reasonably implied, of the National Bank Act or of other Federal acts of paramount authority. *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 566; *First National Bank* v. *Missouri*, 263 U. S. 640, 656."

Continuing, the court said (at page 225, 226):

> "What is regulated in that section is not the relation between a bank and its correspondents during the normal course of business. What is regulated is the relation and the remedy when insolvency has set in and business is suspended. Then for the first time a trust comes into being through the action of the statute, . . . A trust so created, to arise upon insolvency, is a preference under another name. As applied to a national bank, the preference is plainly inconsistent with the system of equal distribution established by the federal law. R. S. sec. 5236; 12 U. S. C., sec. 194; *Davis* v.

Elmira Savings Bank, 161 U. S. 275, 283, 284; *Easton v. Iowa*, 188 U. S. 220, 229; *Cook County National Bank v. United States*, 107 U. S. 445; *Texas & Pacific Ry. Co. v. Pottorff*, 291 U. S. 245; *Lewis v. Fidelity & Deposit Co. of Maryland*, *supra*. **The power of the nation within the field of its legitimate exercise overrides in case of conflict the power of the states.**" (Emphasis ours)

In *Davis v. Elmira Savings Bank*, (1896) 161 U. S. 275, this Court reversed a decision of the New York Court of Appeals and held that a New York statute which granted a preference status to a deposit made by a savings bank was void as applied to an insolvent national bank, because it was in conflict with the policy of ratable distribution contained in the National Bank Act. In determining that there *was* a conflict between the New York law involved and the National Bank Act, this Court stated (at page 284):

> "* * *. It cannot be doubted that one of the objects of the national bank system was to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among all unsecured creditors, and to prevent such banks from creating preferences in contemplation of insolvency. This public aim in favor of all the citizens of every State of the Union is manifested by the entire context of the national bank act."

In *California Bank v. Kennedy* (1897), 167 U. S. 362, it was held, at page 366:

> "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank v. Townsend*, 139 U. S. 67, 73."

And see:

> *Guthrie v. Harkness*, (1905), 199 U. S. 148, 159;
> *First Nat. Bank v. California*, (1923), 262 U. S. 366, 368, 369, 370.

The states can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see fit to permit.

Farmers' Etc. Nat. Bank v. *Dearing*, (1875) 91 U. S. 29, 34.

Cook County Nat. Bank v. *United States*, (1882) 107 U. S. 445, 448.

Davis v. *Elmira Savings Bank*, (1896) 161 U. S. 275, 284.

Jennings v. *U. S. F. & G. Co.*, (1935) 294 U. S. 216, 226.

It must follow, therefore, that even under the *Erie R. Co.* v. *Tompkins* case (which places state common law on the same footing as state statute), the rule followed by the highest court of New York in denying the right of a receiver of a state bank to recover the proceeds of an illegal pledge without restoring the deposit, is inapplicable to national banks if it is inconsistent with the policy or provisions, express or reasonably implied, of the National Bank Act. The decisions of this Court in the *Pottorff* and *Sneeden* cases, as well as the numerous decisions of the lower federal courts holding that receivers of national banks may recover proceeds of illegal pledges or preferential payments made in reliance upon such pledges, without restoring the deposits, seem clearly to be based upon the policy and provisions of the National Bank Act designed to insure a ratable distribution of assets upon insolvency.[1]

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[1] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 567, *cert.* denied 307 U. S. 624; *Joseph* v. *Village of Downers Grove*, 104 F. (2d) 974, 979, *cert.* denied 84 L. Ed. 100; *Inland Waterways Corporation* v. *Hardee*, (App. D. C. 1938) 100 F. (2d) 678, 688, 690; *City of Chicago* v. *Joseph*, (C. C. A. 7th, 1938), 95 F. (2d) 444, 446, 447, *cert.* denied 304 U. S. 578; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer* (C. C. A. 8th., 1938) 94 F. (2d) 257, 258; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 24, 25, *cert.* denied 303 U. S. 653; *City*

If state legislation is unavailing, as applied to national bank receivership liquidation, because contrary to an Act of Congress as construed by the federal courts, any rule of law followed by state courts affecting state banks is unavailing, if contrary to an Act of Congress, as construed by the federal courts.

In *Awotin* v. *Atlas Exchange Bank*, (1935) 295 U. S. 209, this Court reviewed a decision of a state court construing the validity of a repurchase agreement made by a national bank, under which the bank had agreed in writing to repurchase certain bonds on maturity, at par and accrued interest. It was not clear from the decision of the state court whether its conclusion rested upon that court's interpretation of the rules of state law governing the quasi contractual right to compel restitution of the purchase price, or whether its decision was upon the state court's construction of the federal statute. Whether or not the lower court's decision was based upon federal or state law, this Court stated (at p. 213):

> "But we have jurisdiction of the cause to review the ruling of the state court that the express contract was rendered invalid by the federal statute."

It was then stated that this Court could appropriately determine whether the federal statute precludes recovery of the purchase money, and the conclusion was reached that

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of Fort Worth v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, 968; *cert.* denied 304 U. S. 571; *Queenan* v. *Mays* (C. C. A. 10th, 1937) 90 F. (2d) 525, 533, *cert.* denied 302 U. S. 724; *Granzow* v. *Village of Lyons*, Ill., (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *Webb* v. *American Surety Co. of New York*, (C. C. A. 5th, 1937) 88 F. (2d) 171, 174; *Buckley* v. *Southwestern Nat. Bank*, (C. C. A. 3rd, 1937) 88 F. (2d) 263; *Utter* v. *Eckerson* (C. C. A. 9th, 1935) 78 F. (2d) 307, 310; *Illinois Cent. R. Co.* v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, 149 *cert.* denied 291 U. S. 668; *Baltimore & O. R. Co.* v. *Smith*, (C. C. A. 3rd, 1932) 56 F. (2d) 799, 802; *Adams* v. *Cribbis* (D. Colo. 1936) 17 F. Supp. 723, 725; *Faircloth* v. *Atlantic City*, (D. N. J. 1936) 16 F. Supp. 131, 132; *Harrell* v. *Lawhead*, (N. D. W. Va. 1936) 13 F. Supp. 298, 299.

such was the effect of the federal statute. The reason for this holding is stated as follows (at p. 214):

> "The invalidity of the contract was not due to the mere absence of power in the bank to enter into it, in which case restitution, not inequitable to the bank or inimical to the public interest, might be compelled. See Logan County Bank v. Townsend, supra, 74, 75; Hitchcock v. Galveston, 96 U. S. 341, 350. The contract is invalid because it is within the broad sweep of the statute which by mandatory language sets up definite limits upon the liability which may be incurred by a national bank, in the course of its business of dealing in securities, by confining the business to buying and selling 'without recourse.' The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of 'recourse' growing out of the transactions of the business. See Bank of United States v. Owens, 2 Pet. 527, 537; Brown v. Tarkington, 3 Wall. 377, 381; Thomas v. Richmond, 12 Wall. 349, 356; Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 262. National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them. Such a construction of the statute is inadmissible."

There are five federal statutes, all contained in the National Bank Act, which must be considered in determining this case. As the bulk of the illegal payments were made by the Conservator, we call attention to Section 203 of the Bank Conservation Act of March 9, 1933 (U. S. C. title 12, sec. 203) which provides that the rights of all parties with respect to a bank in charge of a Conservator are the same

as if a Receiver had been appointed therefor. Section 5234 of the Revised Statutes, (U. S. C. title 12, sec. 192) provides that a Receiver of a national bank, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association and shall collect all debts, dues and claims belonging to it. Section 5242 of the Revised Statutes (U. S. C. title 12, sec. 91) forbids transfers of assets and payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to the preference of one creditor over other creditors and provides that such transfers or payments shall be utterly null and void. Section 5236 of the Revised Statutes (U. S. C. title 12, sec. 194) provides for the ratable distribution of the insolvent national bank's assets to all creditors. The Enabling Amendment is the only statute authorizing national banks to give security for the safekeeping and prompt payment of deposits of public money of a political subdivision of a state.

When a national bank closes, the rights of all depositors and other creditors attach, and from that time on, the disposition of the assets of the bank is a vital concern to such creditors. As stated in *Adams* v. *Champion*, (1935) 294 U. S. 231, 238:

> "* * * new duties had arisen, new interests had intervened. The assets were now held by the receiver upon a trust for equal distribution."

Consequently, the performance of an *ultra vires* pledge, or overpayments made in reliance thereon, constitutes an attempt to dispose of assets, to which all creditors are entitled, in a manner directly forbidden by the express mandate of Congress, to which reference has been made.

Judge Parker, in *Leonard* v. *Gage*, *supra*, states, in his opinion at p. 24:

> "And we think it clear that the proceeds of the collateral applied in extinguishment of the deposit accounts can be recovered for another reason. To permit the receivers of the failed national bank to thus apply their assets on unsecured claims would be to sanction

the violation of the statutes forbidding preferences and requiring the equal and ratable distribution of the assets. See 12 U. S. C. A. Secs. 91, 194; Illinois Cent. R. Co. v. Rawlings, 5 Cir., 66 F. 2nd 146, 149; Adams v. Cribbis, D. C., 17 F. Supp. 723.

The doctrine that a court will not disturb a fully and completely executed illegal contract, but will leave the parties where it finds them, does not apply here, for the depositors and other creditors of the bank were not in *pari delicto* with the beneficiaries of the wrongful payments, and the receiver, as their official representative, may not thus be deprived of his remedy to recover on their behalf. *LaParr* v. *City of Rockford, Ill., supra; Webb* v. *American Surety Co. of New York, supra; City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964.

Comparable defenses have been asserted by illegally secured depositors in other cases involving suits by national bank receivers to recover the proceeds of pledged assets, or preferential payments made in reliance upon *ultra vires* pledges, and the courts have refused to apply state court decisions in support of any rule of estoppel, or otherwise, which might have defeated a similar suit by a state bank receiver. Since *Erie R. Co.* v. *Tompkins,* (1938) 304 U. S. 64, was submitted to this Court for decision, *certiorari* has been denied in a number of cases where the petitioners asserted that the decisions of the Circuit Courts of Appeal in favor of the national bank receivers were in conflict with state court decisions. *City of Chicago* v. *Joseph,* (C. C. A. 7th, 1938) 95 F. (2d) 444, *cert.* denied (1938) 304 U. S. 578; *Hood v. Hardesty,* (C. C. A. 4th, 1938) 94 F. (2d) 26, *cert.* denied (1938) 303 U. S. 661; *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, *cert.* denied (1939) 307 U. S. 624. *Certiorari* petitions have been denied in similar cases involving suits by national bank receivers to recover illegal preferences, but where no conflict with state law was involved.

Joseph v. *Village of Downers Grove,* (C. C. A. 7th, 1939) 104 F. (2d) 974, *cert.* denied (1939) 84 L. Ed. 100;

Leonard v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, *cert.* denied (1938) 303 U. S. 653;
City of Fort Worth v. *McCamey*, (C. C. A. 5th, 1937) 93 F. (2d) 964, *cert.* denied (1938) 304 U. S. 571;
Queenan v. *Mays*, (C. C. A. 10th, 1937) 90 F. (2d) 525, *cert.* denied (1937) 302 U. S. 724;
Illinois Cent. R. Co. v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, *cert.* denied (1934) 291 U. S. 668.

The First National Bank and Trust Company of Yonkers, before closing, could have set aside or rescinded the illegal pledge transaction and recovered the pledged collateral. *Texas & Pacific Ry.* v. *Pottorff*, and *Marion* v. *Sneeden, supra.* It would seem clear that as a going concern the bank would have been required to make a refund of the amount of the deposit incident to obtaining the relief sought, namely, the return of the collateral. In this connection, however, it must be borne in mind that in neither *Marion* v. *Sneeden, supra,* nor in *Texas & Pacific Ry.* v. *Pottorff, supra,* does this Court take the position that the receivership bank is under no obligation to refund the deposit; the court does take the position *that the depositor has a claim for the whole amount of the deposit, but it can be refunded only on the same basis that payments are made to the other general depositors of the receivership bank,* in compliance with the Congressional mandate that the assets shall be ratably distributed. It is clearly pointed out in the *Pottorff* decision that the making of an illegal pledge while the bank was a going concern could not result in giving the pledgee a preferential status. The *ultra vires* and void act of pledge could not create a prior or preferred right or status superior to that of the general creditors. In other words, the so-called pledgee never was a preferred creditor; at most he was, *prima facie*, a secured creditor, and a secured creditor differs from a general creditor only because he has collateral as security for his deposit. If the security is removed, he is no longer a secured creditor, and merely *retains* the status of a general creditor. Consequently, it appears clear that the status of illegally secured

depositor cannot be *converted* into the status of preferred depositor or creditor. There is not only no legal basis or reasoning which warrants the substitution of a preferential status for an illegally secured status, but to permit this assumption of a preferred creditor status would, of course, be in direct violation of the principles of pro rata distribution required by Section 203 of the Bank Conservation Act (U. S. C. title 12, sec. 203), and by Section 5236 of the Revised Statutes, and would also be in violation of Section 5242 of the Revised Statutes, specifically prohibiting preferential payments. Further, there is no basis for a preferred status on the part of the illegally secured depositor, here, inasmuch as there is no identifiable *res* and no constructive trust meeting the requirements indicated by Mr. Justice Brandeis in *Texas & Pacific Ry.* v. *Pottorff*, *supra*, at page 261.

As the consummation of such an illegal and void pledge would result in an express violation of the foregoing Federal statutes, the receiver is entitled to recover the pledged property,[2] or the proceeds of such pledged assets,[3] or any

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[2] *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 255; *Marion* v. *Sneeden*, 291 U. S. 262, 268; *Fidelity & Casualty Co. of New York* v. *Allen*, (C. C. A. 7th, 1936), 84 F. (2d) 53, 54; *Utter* v. *Eckerson*, (C. C. A. 9th, 1935), 78 F. (2d) 307, 310; *Griffin* v. *Royal* (C. C. A. 4th, 1934) 70 F. (2d) 103; *American Legion et al.* v. *Spurway et al.* (C. C. A. 5th, 1934) 69 F. (2d) 222; *Illinois Cent. R. Co.* v. *Rawlings* (C. C. A. 5th, 1933) 66 F. (2d) 146, 149, cert. denied 291 U. S. 668; *Baltimore & O. R. Co.* v. *Smith*, (C. C. A. 3rd, 1932) 56 F. (2d) 799, 801; *Evale* v. *Tremaine* (W. D. N. Y. 1938) 22 F. Supp. 171, 173; *Faircloth* v. *Atlantic City* (D. N. J.), 16 F. Supp. 131, 133; *Harrell* v. *Lawhead*, (N. D. W. Va, 1936) 13 F. Supp. 298, 299).

[3] *Joseph* v. *Village of Downers Grove*, 104 F. (2d) 974, 979, cert. denied (1939), 84 L. Ed. 100; *Inland Waterways Corporation* v. *Hardee*, (App. D. C. 1938) 100 F. (2d) 678, 685; *City of Chicago* v. *Joseph* (C. C. A. 7th, 1938), 95 F. (2d) 444, 446, cert. denied 304 U. S. 578; *Hood* v. *Hardesty* (C. C. A. 4th, 1938) 94 F. (2d) 26, 29 cert. denied 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938) 94 F. (2d) 257, 259; *Leonard* v. *Gage* (C. C. A. 4th, 1938) 94 F. (2d) 19, 23, cert. denied 303 U. S. 653; *City of Fort Worth* v. *McCamey*, (C. C. A. 5th, 1937)

payments made by the conservator or receiver in an attempt to redeem the pledged property under the mistake of law that the pledge was legal.[4] Likewise, by analogy may be noted the New York decisions hereinafter cited which hold that where a trustee or other fiduciary has inadvertently or even illegally disposed of the assets of his trust, he is still clothed, in his representative capacity, with authority to bring suit to recover.[5]

A national bank receiver may maintain his suit to recover, even though he consented to the sale of the pledged property with the express approval of the Comptroller of the Currency,[6] or with the express approval of the court,[7]

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93 F. (2d) 964, 967, cert. denied 304 U. S. 571; *Queenan* v. *Mays*, (C. C. A. 10th, 1937) 90 F. (2d) 525, 535, cert. denied 302 U. S. 724; *Granzow* v. *Village of Lyons, Ill.* (C. C. A. 7th, 1937) 89 F. (2d) 83, 85.

[4] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 567, cert. denied 307 U. S. 624; *O'Connor* v. *Rhodes* (App. D. C. 1935) 79 F. (2d) 146, 152; *Rusch* v. *Baer*, (N. D. Ill. 1937) 18 F. Supp. 732, 734; *Inland Waterways Corporation* v. *Hardee*, (App. D. C. 1938) 100 F. (2d) 678; *Adams* v. *Cribbis*, (D. Colo. 1936), 17 F. Supp. 723, 724.

[5] *Wetmore* v. *Porter* (C. A. N. Y.), 92 N. Y. 76, 81-85; *Moss* v. *Cohen* (C. A. N. Y.), 158 N. Y. 240, 247-254; *In re Heinze's Estate*, 224 N. Y. 1; *Lee* v. *Horton*, 104 N. Y. 538, 541; *Zimmerman* v. *Kinkle*, 108 N. Y. 282, 287; *Equitable Trust Co.* v. *Miller*, 185 N. Y. S. 661, 622; *Hodgman* v. *Cobb*, 195 N. Y. S. 428, 435; *New York City Employees' Retirement System* v. *Eliot*, 267 N. Y. 193; *Bush* v. *Halstead*, 106 N. Y. S. 133, 136.

[6] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 567; *Inland Waterways Corporation* v. *Hardee* (App. D. C. 1938), 100 F. (2d) 678, 688; *Hood* v. *Hardesty* (C. C. A. 4th, 1938) 94 F. (2d) 26, 27, cert. denied 303 U. S. 661; *Redfield Independent School Dist. No. 20* v. *Schnetzer* (C. C. A. 8th, 1938) 94 F. (2d) 257, 258; *Leonard* v. *Gage* (C. C. A. 4th, 1938) 94 F. (2d) 19, 23, cert. denied 303 U. S. 653; *Granzow* v. *Village of Lyons, Ill.* (C. C. A. 7th, 1937) 89 F. (2d) 83, 85; *O'Connor* v. *Rhodes* (App. D. C. 1935), 79 F. (2d) 146, 153.

[7] *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938) 100 F. (2d) 564, 566; *Redfield Independent School Dist. No. 20* v. *Schnetzer*, (C. C. A. 8th, 1938 94 F. (2d) 257, 259; *Granzow* v. *Village of Lyons*, Ill. (C. C. A. 7th, 1937) 89 F. (2d) 83, 86.

and notwithstanding the fact that when the pledge was made the depositor relied upon an express ruling of the Comptroller that it was valid.[8] The assets pledged represent trust property of the receivership;[9] and their retention after demand would be a conversion of the bank's property.[10] It is the receiver's duty to recover the assets for the benefit of all creditors,[11] and his failure so to do would permit other depositors and creditors to sue in their own right to recover such assets.[12]

Conceding that the purpose of the Enabling Amendment was to equalize the position of national and state banks in competing for public deposit business, (*Lewis* v. *Fidelity Company, supra,* and *McNair* v. *Knott, supra*) the application of the New York rule of estoppel has no bearing at all upon that purpose unless this court is prepared to say that Congress had in mind the procuring of illegal as well as legal pledge contracts by national banks. The Enabling Act admittedly applies the state law for the determination of the legality of a secured public deposit but it cannot be said that Congress intended that the *effect* of illegal pledges by national banks should be determined by the varying rules followed by the various states.

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[8] *Leonard* v. *Gage* (C. C. A. 4th, 1938) 94 F. (2d) 19, 21, cert. denied 303 U. S. 653; *City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, cert. denied 304 U. S. 571.

[9] *Inland Waterways Corporation* v. *Hardee* (App. D. C. 1938) 100 F. (2d) 678, 685, 690.

[10] *City of Chicago* v. *Joseph* (C. C. A. 7th, 1938) 95 F. (2d) 444, 447, cert. denied 304 U. S. 578; *City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, cert. denied 304 U. S. 571; *Webb* v. *American Surety Co. of New York* (C. C. A. 5th, 1937) 88 F. (2d) 171, 174.

[11] *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 261; *LaParr* v. *City of Rockford,* Ill. (C. C. A. 7th, 1938) 100 F. (2d) 564, 567.

[12] *City of Fort Worth* v. *McCamey,* (C. C. A. 5th, 1937) 93 F. (2d) 964, 967, cert. denied 304 U. S. 571; *LaParr* v. *City of Rockford, Ill.* (C. C. A. 7th, 1938), 100 F. (2d) 564, 567; *O'Connor* v. *Rhodes* (App. D. C. 1935), 79 F. (2d) 146, 148, affirmed on this point 297 U. S. 383.

The intent of Congress to require all depositors not holding valid security to participate in the *pro rata* distribution, and in other respects to protect the bank's assets, looking toward obtaining the maximum salvage possible, is evidenced in many federal statutes. Federal taxes are abated where the assets are insufficient to pay depositors.[13] The federal courts are given jurisdiction of suits to wind up the affairs of national banks independent of the amount involved.[14] Court approval of all sales and compromises is required,[15] and advances to protect assets can be made only upon the consent of the Secretary of the Treasury.[16] A special system of liquidation is provided independent of bankruptcy or insolvency statutes,[17] and annual reports of the results are required to be made to Congress.[18]

To summarize, if we assume that there is a conflict between the Federal rule and the local rule as to the effect of an illegal pledge by a national bank, respondent submits that the Federal rule controls, since (1) the construction, interpretation and policy of the provisions of the National Bank Act are involved; (2) the Federal rule recognized by this court in *Texas & Pacific Ry.* v. *Pottorff* and *Marion* v. *Sneeden, supra,* is attributable to the National Bank Act and (3) while the Enabling Amendment is silent on the effect of an illegal pledge, the provisions of the National Bank Act forbidding preferential payments in excess of ratable dividends expressly supply that effect.

Petitioners refer at pages 19 and 20 of their brief to the rule on *ultra vires,* as expressed in the *Restatement of the Law of Conflicts of Law,* Section 166c. We have no quarrel with this general statement of law, which would apply to the ordinary corporation, organized in one State and

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[13] U. S. C. title 12, sec. 570.
[14] U. S. C. title 28, sec. 41(16).
[15] U. S. C. title 12, sec. 192.
[16] U. S. C. title 12, secs. 198, 199.
[17] U. S. C. title 12, secs. 91, 192, 193, 194.
[18] U. S. C. title 12, sec. 14.

doing business in another State, when the act committed in the second State may be *ultra vires*. That is not the instant situation wherein we have the question of the distinction between the local law of New York on the one hand, and, on the other hand, the policy and provisions of federal statutes.

At pages 12 and 19, petitioners discuss the case of *Texas & Pacific Ry.* v. *Pottorff, supra*, and contend that the effect of an *ultra vires* contract as defined in that decision was grounded on the application by the Court of the federal common law as the rule to be followed without relation to the provisions of the National Bank Act.

Throughout the opinion the Court referred to the National Bank Act and its provisions,—express or implied,—as reasons for the conclusions reached. Thus, under point "First" (pp. 253-260), the Court indicated that the National Bank Act is a complete system for the government, supervision, and winding up of national banks, and called attention to the provisions of the Act designed to insure uniformity in the treatment of depositors and to insure a ratable distribution of assets. It was pointed out that this policy of the National Bank Act requiring equal treatment of all creditors was held even to preclude a preference to the United States.

After this very general discussion of the Act, the policy of the Act, and the powers of national banks under the Act, the Court, under point "Second" (pp. 260-261) indicated its views as to the result of unauthorized transactions by national banks, stating in unmistakable terms that even if the bank were estopped from asserting lack of power, the receiver is free to challenge the validity of the pledge. The reason for this is stated on pages 260 and 261 where the Court says that the unauthorized pledge reduced the assets available to the general creditors, and that it was the receiver's duty to set aside transactions which illegally reduce the assets available for the general creditors. Having discussed, under point "First" the provisions of the

National Bank Act requiring equal treatment and a ratable distribution of assets, and forbidding preferences, it was unnecessary for the Court, under point two, to repeat the reasons why this rule of law is peculiarly applicable to national banks and their liquidation.

Under point "Third" (pp. 261-262) the Court holds that the receiver may assert the invalidity of the pledge without repaying the pledgee's deposit in full, and holds that the argument of the Railway to the effect that it is entitled to payment in full as a result of the *ultra vires* contract, is unavailing because there is no identifiable *res* and constructive trust based on special circumstances of misconduct which would confer a preference over other creditors. It is obvious that the Court again had in mind the provisions and policy of the National Bank Act, and we submit that it was unnecessary for repetitious references to be made to these sections of the National Bank Act which expressed the congressional mandate that preferences cannot be made and that all alike must share ratably in the liquidation of an insolvent national bank.

On the same day this Court decided the *Pottorff* case it also handed down a decision likewise given by Justice Brandeis in the case of *Marion* v. *Sneeden, Receiver*, (1934) 291 U. S. 262. This decision concerning the validity of a pledge to secure a public money deposit of a city in Illinois also involved the application of the Enabling Amendment of June 25, 1930. In discussing this Amendment the Court stated at page 268:

> "A national bank could not legally pledge assets to secure funds of a State, or a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized."

The Court then examined the power given Illinois state banks and came to the conclusion that banks organized under the laws of Illinois do not possess the power of pledging assets to secure the deposit of public moneys of a polit-

ical subdivisions. After deciding that the pledge of assets made by the national bank in Illinois to secure the deposit of the city of Marion was illegal, this Court stated at page 272:

> "Since the Herrin bank was without power to make the pledge of bonds here in question, its receiver is entitled to recover them unconditionally in order that they may be administered for the benefit of the general creditors of the bank. See *Texas & Pacific Ry. Co.* v. *Pottorff, ante*, p. 245."

On pages 12 and 19 of their brief petitioners also state that the case of *State Bank of Commerce* v. *Stone, supra,* was simply cited in the *Pottorff* case as *contra,* "instead of distinguishing the *Pottorff* case as one construing a statute." *State Bank of Commerce* v. *Stone* is referred to in Note 17 of this Court's opinion in the *Pottorff* case as being *contra* to other authorities therein cited on the question of estoppel in pledge cases. The rule of estoppel upheld in the *State Bank of Commerce* case was discussed at length in the briefs filed by both petitioner and respondent in this Court in the *Pottorff* case and was likewise so discussed at length in the briefs filed with this Court in the companion case of *Marion* v. *Sneeden, supra,* decided the same day. The *Stone* case was also discussed at length and the rule of estoppel therein referred to was approved by Circuit Judge Alschuler in his *dissenting opinion* in the Circuit Court of Appeals in the *Sneeden* case, 64 F. (2d) 721, 731, 734. But of course, this view as to the effect of an *ultra vires* pledge was rejected by the majority at pages 729 and 730 and by this Court in deciding *Marion* v. *Sneeden, supra,* and *Texas & Pacific Ry.* v. *Pottorff, supra.*

It is thus clear that the case of *State Bank of Commerce* v. *Stone* was not merely cited by the court as *contra,* but that the case was cited only after careful consideration of the doctrine of estoppel as therein set forth, and that notwithstanding such consideration of that case, this Court deliberately held that the rule of estoppel could not be

invoked in national bank receivership cases so as to defeat the plain purposes and objectives of the national banking laws.

On pages 13 and 22 of their brief, petitioners contend, in effect, that inasmuch as the pledge in the instant case was made before insolvency, the consequent lien arising therefrom arose prior to insolvency and hence is binding notwithstanding subsequent insolvency. The obvious answer to this contention is that no lien could possibly arise from an invalid, illegal pledge. This is not a situation such as was involved in *Lewis* v. *Fidelity Co.*, 292 U. S. 559, where this Court held that an Act of Congress, authorizing an agreement for security, previously *ultra vires*, removed one of the obstacles to the original agreement and permitted the lien to become operative from the date of the Act.

In *Lewis* v. *Fidelity Co.*, *supra*, this Court held, at page 564:

> "In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress. It follows that, in 1928, no lien arose when the bank was appointed depository; and that the judgment of the Circuit Court of Appeals must be reversed unless the Act of June 25, 1930, c. 604, 46 Stat. 809, authorizes a national bank to give as security a general lien of the character prescribed by the Georgia statutes."

and at page 570:

> "The appointment was within the power of the State to confer and of the bank to accept, but by reason of the paramount federal law one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from the date of the Act."

(C) The New York Law as to the Consequences of the Pledge Was Not Incorporated in the National Bank Act by Reference.

Notwithstanding petitioners concede that the pledge in the instant cases is *ultra vires*, nevertheless they contend that inasmuch as the New York law permits the depositor to retain the pledge until his deposit is paid in full, the "*de facto*" validity of the pledge transaction is thereby recognized, and is thereby "authorized" within the meaning of that term as used in the Enabling Amendment. In other words, it is contended that the Enabling Amendment absorbs the state general rule of estoppel. The Circuit Court of Appeals in the instant case answered this argument as follows:

> "* * * a pledge which is '*ultra vires*' cannot be said to be authorized." (R. 229)
>
> "* * * the words 'authorized by the law of the state' plainly relate to the authority of state banks under their charters and not to the effect to be given to their *ultra vires* acts." (R. 230-231)

Restated, the fact that the New York law erects an estoppel and thereby enables the public depositor in a state bank to retain the pledge until the deposit is paid in full, does not thereby convert the *ultra vires* pledge into a legal, valid, *intra vires*, or authorized pledge.

It would seem perfectly clear that invocation of the rule of estoppel preventing rescission of an illegal and *ultra vires* transaction without first returning the consideration received thereunder, performs no amendatory operation upon, and has no interpretative relation to, the charter powers of a bank, whether state or national. The distinction must be recognized, however, that while the New York rule of estoppel may have the effect, in the case of a state bank, of virtually nullifying the state law prohibiting pledges of assets by state banks to secure public deposits, nevertheless the state law invoking estoppel as to state

banks cannot defeat the purpose and policy of the federal statutes prohibiting such pledges by national banks. In this connection, and in considering the relation of the rule of estoppel to the prohibition of pledges of assets by national banks to secure deposits, this Court said, in *Texas & Pacific Ry.* v. *Pottorff, supra* (p. 260):

> "It is the settled doctrine of this Court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. *California Bank* v. *Kennedy*, 167 U. S. 362; *McCormick* v. *Market Bank*, 165 U. S. 538; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24."

While the Texas and Pacific Railway case concerned the private deposit of the railway, and not a public deposit of a state or political subdivision thereof, the Court necessarily analyzed and applied the national banking statutes and the policies provided thereunder relating to the powers of national banks, including consideration of the Enabling Amendment and the nonapplication of the rule of estoppel. (See discussion herein, *supra* p. 29). The doctrines there established,—including the principles that no rights can arise on an *ultra vires* contract, and that an estoppel cannot be erected to defeat the purposes of the national banking statutes—apply with equal force to the situation where a national bank has made an *ultra vires* pledge of assets to secure the deposit of a political subdivision of a state under the supposed "*authority*" of the Enabling Act; and, as heretofore pointed out (*supra* p. 31), this Court so held in the companion case of *Marion* v. *Sneeden, supra.*

The word "authorized" as used in the Enabling Amendment, must be taken to have its usual connotations: "possessed of, or endowed with, authority * * * sanctioned or approved by authority"; the word "authority" is defined as "legal or rightful power"—*Webster's New International Dictionary, 1936.* The Circuit Court of Appeals in

the instant case, in examining into the meaning of the word "authorized" as used in the Enabling Act, held that the words "authorized by the law of the State" plainly related to the authority of State banks under their charters and not to the effect to be given to their *ultra vires* acts (R. 230). The Court also held that a pledge which is "*ultra vires*" cannot be said to be "authorized" (R. 229). It was also pointed out in the Circuit Court of Appeals opinion (R. 229):

> "So far as the Act of June 25, 1930, may be thought to require an authorization of State banks to make pledges as a prerequisite for pledges by national banks, it does not apply here."

It would seem obvious that the purpose of the Enabling Act,—to permit national banks to compete with State banks for deposits of public moneys,—does not contemplate that national banks may override the prohibitory provisions of the Enabling Act and perform *ultra vires* acts in competing for such business, particularly in view of the fact that such course would defeat the policy and provisions of the winding-up provisions of the national banking laws which immediately become effective upon the closing of a national bank and are designed to insure *pro rata* distribution of assets and to prevent preferential payments. The court below, in analyzing this situation, states (R. 229):

> "The banks of the State cannot give security in a case like this without violating their charters; Congress could not have intended to meet that type of competition."

Preferential payments or transfers of assets made by national banks in contemplation of, or after the commission of, an act of insolvency, with a view to creating a preference, are null and void under Section 5242 of the Revised Statutes, and this section forges a strong weapon in assisting the Comptroller and the receiver to enforce the ratable distribution provision contained in Section 5236 of

the Revised Statutes. The absence of a similar statute forbidding preferences in the New York banking law may well be the reason for the failure of its courts to enforce the ratable distribution statutes in the State banking law.[19] In no single case involving similar suits by national bank receivers to recover assets pledged under an *ultra vires* contract, or preferential payments made in reliance upon such an *ultra vires* pledge, have the federal courts in any State applied the construction which the New York courts have given in similar suits by State bank receivers wherein return of the deposit in the State bank is held to be a condition precedent to recovery of the pledged collateral or its proceeds.[19] This defense, then, in the numerous suits by national bank receivers which have been adjudicated since this Court handed down the *Pottorff* and *Sneeden* decisions in 1934, has never been successfully asserted in any federal court in any State. The reason for this is obvious; the federal courts have looked to the policy and provisions of the whole National Bank Act in determining the results to be attained in other similar suits. *Illinois Cent. R. Co.* v. *Rawlings*, (C. C. A. 5th, 1933) 66 F. (2d) 146, 149, *cert.* denied (1934) 291 U. S. 668; *Leonard* v. *Gage*, (C. C. A. 4th, 1938) 94 F. (2d) 19, 24, *cert.* denied (1938) 303 U. S. 653; *Hood* v. *Hardesty*, (C. C. A. 4th, 1938) 94 F. (2d) 26, 29, *cert.* denied (1938) 303 U. S. 661; *Adams* v. *Cribbis*, (D. Colo. 1936) 17 F. Supp. 723. Also see cases herein cited in footnotes 2-4, 6-12, *supra* pages 25-27.

With reference to the comments on pages 28-29 of petitioners' brief concerning competition between state and national banks in New York, we assume there is no suggestion by petitioners as to any lack of competition among state and national banks for deposits of public money of the state

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[19] Sections 625, 627 N. Y. Banking Law. The New York Banking Law contains eight statutes providing for preferential payment of deposits of various kinds in the event of insolvency of State banks. Sections 20, 30, 100 b(3), 166, 445, 456, 618, 621 of the New York Banking Law.

and some of its political subdivisions whose funds, by express statutory authority, may be secured by a pledge of assets.[20] The failure of the state legislature to require security for deposits of public money belonging to second-class cities simply reveals the absence of a uniform policy in the state relative to the securing of public monies.[21]

(D) The New York decisions are to the effect that New York courts should follow the decisions of the Supreme Court in the interpretation and construction of Federal statutes, and Federal policies thereunder implied including the National Banking statutes and decisions construing the same.

The following cases support the above entitled caption:

In *Hatermister* v. *First National Bank*, (1876) 64 N. Y. 212, the Court of Appeals stated at page 214:

> "The Supreme Court of the United States having given an interpretation to the act of congress regulating the interest which may be lawfully taken by national banks, and declaring the penalties for demanding or receiving interest at a greater rate than that allowed by law, adverse to the views of this court, as expressed in *The National Bank of Whitehall* v. *Lamb* (50 N. Y. 95), neither that case nor that of *The Farmers' Bank of Fayetville* v. *Hale* (59 N. Y. 53) can be longer considered as furnishing a rule for decision in cases within the principle of the adjudication by the Federal court. The decisions of that court in all matters of Federal jurisprudence and of the interpretation of the acts of congress, are paramount to and binding upon all other courts."

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[20] Sections 8, 10, 11, and 62 of the *State Finance Law;* section 145 of the *County Law;* section 64 of the *Town Law;* section 196 of the *Greater New York Charter.*

[21] This is also reflected by the failure of the legislature to continue former provisions for security of certain school district funds in recent amendments to section 254 of the *Education Law* and Village Funds in recent amendments to section 89 (20) of the *Village Law.* As recently as April 5, 1939, section 96 of the State Banking Law was amended to permit state banks to pledge assets as security for bankruptcy funds.

In *Appleton v. Citizens' Central National Bank*, (1908) 190 N. Y. 417, the Court of Appeals stated at page 420:

> "We may further assume that in transactions by national banks we should adopt the law of *ultra vires* as it prevails in the Federal courts, and not the local law on the subject."

And see *Duncomb et al.* v. *N. Y., H. & N. R. R. Co. et al.*, (1881) 84 N. Y. 190; *Longley* v. *Coons*, (1935) 244 A. D. 391, affirmed 268 N. Y. 712; *Buffalo German Ins. Co.* v. *Third Nat. Bank*, (1898) 29 A. D. 137.

In view of the foregoing it would seem that even if the instant case had arisen in the state courts of New York, th said courts would have felt impelled to follow the decisions of this Court in *Texas and Pacific Ry.* v. *Pottorff*, and *Marion* v. *Sneeden, supra*, in disposing of the issues involved in the instant case including the principles that no rights can arise upon an *ultra vires* pledge contract entered into by a national bank and that a receiver of a national bank cannot be prevented from recovering the illegally pledged collateral, or the proceeds thereof, or illegal or preferential payments made in reliance upon the illegal and *ultra vires* contract, by the erection of the doctrine of estoppel.

REPLY TO "POINT II" OF PETITIONERS' ARGUMENT.

Preliminary Statement.

The discussion, both in petitioners' brief and herein, under the foregoing point is restricted to the question of the validity of the payments made by the bank between the dates March 8, 1933 and March 18, 1933, and made therefore prior to the date of appointment of the conservator on March 20, 1933. Petitioners thus appear to concede that payments made by the conservator were illegal, assuming, of course, that petitioners' contentions under Point I of their argument are untenable and can not be sustained.

Having this assumption in mind, it seems clear that payments made by the conservator to petitioners were illegal. Section 203 of the Bank Conservation Act (U. S. C., title 12, sec. 203) provides:

> "The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this title, to which receivers are now or may hereafter become subject. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this subchapter, be the same as if a receiver had been appointed therefor."

Section 206 of the Bank Conservation Act (U. S. C., title 12, sec. 206) provides:

> "While such bank is in the hands of the conservator appointed by the Comptroller of the Currency, the Comptroller may require the conservator to set aside and make available for withdrawal by depositors and payment to other creditors, on a ratable basis, such amounts as in the opinion of the Comptroller may safely be used for this purpose; * * *"

Section 5236 of the Revised Statutes (U. S. C., title 12, sec. 194) provides for ratable distribution only to depositors and other creditors.

Consequently, such payments were contrary to the provisions of said Section 203 of the Bank Conservation Act, *supra*, in that they did not constitute ratable distribution to petitioners on a parity with the other depositors and other creditors of the bank, but constituted payments made

to petitioners alone, in full of their deposits, and under mistake of law by the conservator as to his authority to make such payments and in reliance upon the erroneous assumption that the pledge contract was valid.

ALL PAYMENTS MADE BY THE BANK TO THE PETITIONERS DURING THE BANKING HOLIDAY AND PRIOR TO THE APPOINTMENT OF THE CONSERVATOR WERE ILLEGAL AND WERE RECOVERABLE BY THE RECEIVER BECAUSE THEY CONSTITUTED PREFERENTIAL PAYMENTS PROHIBITED BY THE NATIONAL BANKING LAWS AND FURTHER BECAUSE SAID PAYMENTS WERE NOT AUTHORIZED UNDER THE PRESIDENT'S PROCLAMATIONS AND THE REGULATIONS ISSUED THEREUNDER.

(A) The Payments by the Bank to the Petitioners Between March 8th and March 18, 1933, Were in Violation of U. S. C., Title 12, Sec. 91.

Section 5242 of the Revised Statutes (U. S. C., title 12, sec. 91) (App. 51) prohibits payments to creditors of a bank after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of the assets of the bank in the manner prescribed by the national banking laws, or with a view to the preference of one creditor to another.

Said Section 5242 of the Revised Statutes appears to have been last considered by this Court in *Mechanics Co.* v. *Culhane*, (1936), 299 U. S. 51, 55, wherein Mr. Justice Brandeis, in delivering the opinion, said:

> "One of the objects of the national bank system is to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among unsecured creditors, and to prevent such banks from creating preferences in contemplation of their failure.

Compare *National Bank* v. *Colby*, 21 Wall. 609, 613-614; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 284, 290. To that end R. S. sec. 5242, 12 U. S. C. sec. 91, prohibits preferential payments. That prohibition is not directed solely to managing officers. The duty not so to defeat the just and equal distribution of the assets commanded by the Act rests upon all who obtain such knowledge by reason of their connection with the bank—upon directors and employees as well as upon the executive officers."

Both courts below found that this bank was insolvent on March 6, 1933, prior to any of the payments complained of (R. 159, 233). This Court will not disturb findings of fact made by a District Court concurred in by the Circuit Court of Appeals, except in cases of clearest error. *Charleston Min. Co.* v. *United States*, (1927), 273 U. S. 220, 223; *Page* v. *Rogers*, (1909), 211 U. S. 575, 577.

Where a bank suspends normal operations under a mandatory legislative act of the sovereign which created it, and does not thereafter reopen for normal banking transactions, its insolvency dates from suspension of payment. *Godfrey* v. *Terry*, (1877), 97 U. S. 171, 173. See also *Carrol et al.* v. *Green et al.*, (1875), 92 U. S. 509, 516; *Terry* v. *McLure*, (1880), 103 U. S. 442. This rule has been applied to national banks which closed pursuant to the President's proclamations. *Gimbel* v. *Harriman Nat. Bank & Trust Co.*, (S. D. N. Y., 1935), 11 F. Supp. 836, 839; *Goess* v. *Heckscher*, (S. D. N. Y. 1934) (App. 57); *Pyne* v. *Jackman*, (S. D. N. Y. 1934) 12 F. Supp. 653, 656. The rule has also been applied to state banks closed pursuant to state legislation or gubernatorial proclamation during the 1933 banking crisis. *Ghingher* v. *Pearson*, (Md., 1933), 168 A. 105; *Hospelhorn* v. *General Motors Corporation*, (Md., 1936), 182 A. 442; *Baker-Cammack Textile Corporation* v. *Hood*, (N. C., 1934), 175 S. E. 151; *In re Canal Bank & Trust Co.*, (La., 1934), 152 So. 578; and *In re Canal Bank & Trust Co. in Liquidation*, (La., 1934), 154 So. 498.

The insolvency of the Yonkers bank was before its officers, if they would contemplate it, on March 8, 1933, and consequently all payments made thereafter to the city were *ultra vires* and absolutely void. The rule is stated as follows in *Nelson* v. *Lewis*, (C. C. A. 2nd, 1934), 73 F. (2d) 521, 523.

> "If the financial condition of a bank is such that an actual act of insolvency is imminent, and the officers of the bank know or ought to know this condition, a payment to a creditor or depositor is void if not made in the ordinary course of business; an intent to prefer is presumed under such conditions, and as a rule the creditor and depositor need not know of the imminency of the act of insolvency. *National Security Bank* v. *Butler*, 129 U. S. 223, 9 S. Ct. 281, 32 L. Ed. 682; *Federal Reserve Bank of Kansas City* v. *Omaha Nat. Bank*, (C. C. A.) 45 F. (2d) 511; *Parks* v. *Knapp*, 29 F. (2d) 547 (C. C. A. 3); *American Surety Co. of N. Y.* v. *Jackson*, 24 F. (2d) 768 (C. C. A. 9); *Brill* v. *McInnes*, 14 F. (2d) 306 (C. C. A. 8)."

There is ample evidence to support the findings of the courts below that this bank was insolvent on March 6, 1933. This case was tried on January 9, 1938, almost five years after the bank's suspension, at which time the proceeds of the assets, plus stock assessment collections had permitted dividends to creditors totaling 50 per cent only. The extent to which the 40 per cent dividend of December 16, 1933, exhausted the assets is indicated by the fact that only ten per cent additional could be paid on November 3, 1937, after four more years of liquidation and after stock assessment collections had been added. The Federal courts will take judicial notice of the annual reports of the Comptroller of the Currency to Congress, *Tempel* v. *United States*, (1918), 248 U. S. 121, 130; *Hardee* v. *Washington Loan & Trust Co.*, (App. D. C. 1937) 91 F. (2) 314 and of the fact that sound banks located in cities of the Yonkers class were licensed to do an unrestricted business on March 15, 1933.

A further indication of the facts before the officers of this bank on March 6, 1933, may be found in the annual report of the Comptroller of the Currency to Congress for the year ending October 31, 1937, House Document No. 395, 75th Congress, 2nd Session, pages 350 to 353. This report evidences that the assets of the bank at suspension were estimated as "Good" $10,304,229; "Doubtful" $6,625,062 and "Worthless" $1,129,434 against creditor liabilities of $17,697,374. An assessment of $1,000,000 was levied against the shareholders resulting in collections of $388,606 which was added to the bank's assets to pay dividends.

The officers of the bank must be charged with knowledge of the fact that the other banks in the City of Yonkers were permitted to reopen on March 15, 1933, and, on the other hand, that still other banks, including their bank, were denied licenses to reopen on that date. Nevertheless, they made further payments to petitioners between March 15th and March 18, 1933 totaling $64,671.69. (R. 143 in No. 542, R. 91 in No. 543, R. 91 in No. 544.)

The authorities cited by the petitioners at page 31 of their brief including this court's decision in *McDonald, Receiver* v. *Chemical Nat'l Bank*, (1899), 174 U. S. 610, give the City no assistance under the facts in the instant case. All of these cases, where the decisions were adverse to the National bank Receiver, involved payments by the bank *in the ordinary course of business*. None of the cases cited involved payments made by a closed insolvent national bank during the National banking holiday.

Petitioners do not discuss or cite the decision of this Court in *Mechanics Co.* v. *Culhane, supra*, wherein the rule of *McDonald, Receiver* v. *Chemical Nat'l Bank* was recognized but where, nevertheless, the transaction was held to be an illegal preference. To quote from Mr. Justice Brandeis' opinion (299 U. S. 56),

> "It is true that ordinarily a payment made by a bank to a depositor in the usual course of business is not recoverable, even though the bank was then clearly in-

solvent. Compare *McDonald* v. *Chemical National Bank*, 174 U. S. 610. *But the payment here in question was not made in the usual course of business;* * * *" (Italics inserted)

Respondent submits that all of the payments here in question were likewise not made in the usual course of the bank's business.

The Yonkers bank ceased payments in the usual course of business on March 3, 1933, and the courts below found that on March 6, 1933 it was insolvent. The Yonkers bank never made any payments in the usual course of business after March 3, 1933. The President's proclamation and the regulations issued thereunder did not permit banks to resume payments in the ordinary course of business but permitted banks to make certain types of payments only, and then only *if their condition permitted.* Both courts below held that the payments by the bank during the banking holiday violated U. S. C., title 12, sec. 91 and we submit these decisions should be affirmed.

It is settled by the decisions of this Court in *Scott* v. *Armstrong*, (1892), 146 U. S. 499 and *Dakin* v. *Bayly*, (1933), 290 U. S. 143, that the rights of all parties against National banks attach at the time of insolvency. In the usual case insolvency is fixed by the resolution of the bank's board of directors surrendering the bank to the Comptroller of the Currency for liquidation. There was no occasion for this during the banking holiday, inasmuch as the banks were already closed by the Presidential proclamation, and were without authority to carry on their ordinary banking operations. They were thereafter either permitted to reopen, or were placed in conservatorship followed by receivership as the condition of the particular bank seemed to require. The Comptroller of the Currency was charged with the administration of the Bank Conservation Act of March 9, 1933, (U. S. C., title 12, sec. 201 et. al.) and it was his duty to determine the date of the insolvency of the banks remaining closed under the Act, for the purposes of computing in-

terest on deposits, allowing offset claims, and allowing claims against the liquidator. In the instant case (as in all cases where a conservator was appointed and the bank ultimately was liquidated) the Comptroller fixed the date of insolvency as the last date on which the bank did an unrestricted banking business. (R. 49.) Hundreds of National banks have been liquidated under this principle and nearly seven years have elapsed since the banking holiday. The trial court found that the rights of the creditors of this bank in the instant case became fixed as of March 6, 1933. (R. 159.) This creates no conflict inasmuch as the bank never reopened after March 3, 1933, and the payments complained of commenced on March 8, 1933.

The contemporaneous construction placed upon a law by the officer charged with its administration, where uniform and long continued, will be given great weight by the courts in passing upon a statute so construed and in case of doubt will be controlling. *Plummer* v. *United States,* (1912) 224 U. S. 137; *United States* v. *Finnell,* (1902) 185 U. S. 236; *Heath* v. *Wallace,* (1891) 138 U. S. 582. The following cases support the soundness of the Comptroller's decision that the rights of all parties against these banks attached on the date they last did an unrestricted banking business:

Hardee v. *Washington Loan & Trust Co., supra.*
Dehne v. *Mine Safety Appliance Co.,* (C. C. A. 3rd, 1938), 94 F. (2d) 956.
Goess v. *Heckscher,* (App. 57).
Willing v. *Eveloff,* (C. C. A. 3rd, 1938), 94 F. (2d) 344, cert. denied (1938) 305 U. S. 611.
Kullman & Co. v. *Woolley,* (C. C. A., 5th, 1936), 83 F. (2d) 129.

(B) The Payments Made by the Bank to the Petitioners Between March 8th and March 18, 1933 Were Not Authorized Under the President's Proclamations and the Regulations Issued Thereunder.

All of the payments totaling $89,942.73 made by the bank to the City between March 8th and March 18, 1933 and while the bank was closed under the President's proclamations were illegal and were recoverable, *independently* of the *illegal preference section*, Section 5242 of the Revised Statutes, (U. S. C., title 12, sec. 91). The Receiver alleged in his complaint (R. 8, 26) that these payments were "unlawful, illegal, *ultra vires*, null and void."

The President's proclamations (App. 54-56) prohibited all banks from making any payments whatsoever either for payroll or any other purposes. The proclamation of March 6, 1933 provided "that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, * * * nor shall any banking institution or branch pay out deposits, * * * or transact any other banking business whatsoever." A penalty was provided for violations.

One of the purposes of the proclamations was the protection of the interests of depositors. The situation under the banking holiday is discussed by the United States Court of Appeals for the District of Columbia in *Hardee* v. *Washington Loan & Trust Co.*, (App. D. C., 1937), 91 F. (2d) 314, wherein the court says at page 316:

> "On March 9, 1933, the President sent a message to both Houses of Congress containing among others the following statements:
>
> "On March 3 banking operations in the United States ceased. To review at this time the causes of this failure of our banking system is unnecessary. Suffice it to say that the Government has been compelled to step in *for the protection of depositors* and the business of the nation." (Italics inserted.)

Judge Knox summarizes the purposes of the proclamations in his unreported opinion in *Goess, Receiver of the Harriman National Bank and Trust Company of the City of New York* v. *Heckscher*, (S. D. N. Y., 1934) (App. 57):

> "The emergency in the country's banking system that presented itself in March of 1933, was such as to induce the President to proclaim the memorable bank holiday that marked his inauguration and to follow it with his executive order of March 10, 1933. I cannot but conclude that one of the purposes of the action then taken was to conserve the status of the banks within the national system, and to fix the right of their debtors and creditors as of the date of the proclamation, unless and until it should thereafter appear that, as of such date, a particular bank was in condition to be permitted to resume business. Unfortunately, that condition could not be exhibited by Harriman National Bank and Trust Company, and it never reopened. If, during the time that the bank was closed some persons, to the exclusion of others, could position themselves so as to be preferred creditors of the institution, it would be most unfair to depositors who could not withdraw their funds, and it would, also, serve to frustrate the purposes and intent of the Presidential proclamation and executive order."

Regulation No. 10 of the Secretary of the Treasury, as amended on March 10, 1933, provided: (amended matter shown in italics)

> "Any national or State banking institution may exercise its usual banking functions to such extent as its situation shall permit and as shall be absolutely necessary to meet the needs of its community for food, medicine, other necessities of life, for the relief of distress, for the payment of usual salaries and wages, for necessary current expenditures for the purpose of maintaining employment, and for other similar essential purposes. *Banking institutions may carry out such transactions as may be necessary to aid banking institutions in other communities to meet the necessities set forth above.* Provided, however, That (1) every

precaution shall be taken to prevent hoarding or the unnecessary withdrawal of currency; (2) No State banking institution shall engage in any transaction under this regulation which is in violation of State or Federal law or of any regulation issued thereunder; (3) No National banking association shall engage in any transaction under this section which is in violation of any Federal law or of any order or regulation issued by the Comptroller of the Currency; and (4) No gold or gold certificates shall be paid out. Each banking institution and its directors and officers will be held strictly accountable for faithful compliance with the spirit and purpose as well as the letter of this regulation.

"Federal reserve banks may carry on such functions as may be necessary to facilitate transactions authorized by this regulation.

"In order to enable member banks of the Federal Reserve System to meet the needs of their respective communities to the extent authorized by this regulation Federal reserve banks may make advances to such member banks under the conditions set forth in Section 10 (b) of the Federal Reserve Act as amended by the act of March 9, 1933, and in accordance with authority granted by the Federal Reserve Board.

"In addition, in order to enable individuals, partnerships and corporations to meet their immediate payroll requirements, Federal reserve banks may make temporary advances to such individuals, partnerships and corporations on their promissory notes secured by direct obligations of the United States in accordance with authority granted by the Federal Reserve Board."

It will be noted from the foregoing that the banks were not permitted to carry on their usual banking functions unrestrictedly, but on the contrary they were limited to the operations therein specified. Furthermore, even these limited functions were further restricted in that they could be performed by a bank only "to such extent as its (the bank's) situation shall permit" and subject to the additional qualifications that "no national banking association shall engage in any transaction under this section which is in violation of any federal law" and that "each banking

institution and its directors and officers will be held strictly accountable for the faithful performance, with the spirit and purpose, as well as the letter of this regulation."

It follows from the foregoing that notwithstanding the provisions of said Regulation No. 10 permitting the limited operations therein specified, if such bank, while still remaining closed by virtue of the banking holiday, was, at such time, insolvent, its "situation" would not "permit" it to disburse any payments to any one or more of its depositors which were not also ratably made to all of its depositors and other creditors, inasmuch as said bank could not make such disbursements "in violation of any federal law", and the bank, its directors and officers, were required to be "strictly accountable, for the faithful performance, with the spirit and purpose, as well as the letter" of the regulation in performing the permitted limited functions. It was a violation of law for an insolvent bank thus remaining closed, to make preferential payments to certain depositors as distinguished from a *pro rata* distribution to all depositors, and the fact that the preferential disbursements thus made were to be used "for the payment of usual salaries and wages" did not change the legal consequences that such disbursements constituted preferential payments. Regulation No. 10 was withdrawn as of the close of business March 18, 1933 by regulation No. 28. (App. 56). The payments made by the Conservator, commencing March 20, 1933, (R. 143) were prohibited by the proclamations and regulations as well as the statute under which he was appointed, Section 203 of the Bank Conservation Act (U. S. C., title 12, sec. 203). The trial court found that all of these payments violated the proclamations and regulations (R. 194), and we submit this finding should be affirmed.

It follows, therefore, that the payments made between March 8 and March 18, 1933, were not authorized by the Presidential proclamations and the regulations issued thereunder.

CONCLUSION.

The judgments of both courts below in cases Nos. 542, 543, 544 and 545 should be affirmed and the petitioners should be allowed general creditor claims only against the bank receivership for all of their deposit balances reconciled as of the close of business March 3, 1933.

Respectfully submitted,

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APPENDIX.

U. S. C., Title 12, sec. 90. Depositaries of public moneys and financial agents of Government.

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (R. S. sec. 5153; Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809.)

U. S. C., Title 12, sec. 91. Transfers by bank and other acts in contemplation of insolvency.

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking as-

sociation, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S. sec. 5242.)

U. S. C., Title 12, sec. 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit

United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 percentum per annum upon the average monthly amount of such deposits. (R. S. sec. 5234; May 15, 1916, c. 121, 39 Stat. 121; Aug. 23, 1935, c. 614, sec. 339, 49 Stat. 721.)

U. S. C., Title 12, sec. 194. Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. sec. 5236.)

U. S. C., Title 28, sec. 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

• • • • • • • • • • •

(16) *Suits against national-banking associations.* Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said chapter. And all national banking associations established under the laws

of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located. (R. S. Sec. 563, par. 15, sec. 629, pars. 10, 11; Mar. 3, 1911, c. 231, sec. 24, par. 16, 36 Stat. 1092.)

Proclamation of President of March 6, 1933, declaring a bank holiday.

PROCLAMATION NO. 2039.

"WHEREAS there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

"WHEREAS continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

"WHEREAS these conditions have created a national emergency; and

"WHEREAS it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

"WHEREAS it is provided in Section 5 (b) of the Act of October 6, 1917, (40 Stat. L. 411) as amended, 'That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency * * *' and

"WHEREAS it is provided in Section 16 of the said Act 'that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisonment for not more than ten years, or both; * * *';

"NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said Act and in order to prevent the export, hoarding, or

earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, Nineteen Hundred and Thirty Three, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever.

"During such holiday, the Secretary of the Treasury, with the approval of the President and under such regulations as he may prescribe, is authorized and empowered (a) to permit any or all such banking institutions to perform any or all of the usual banking functions, (b) to direct, require or permit the issuance of clearing house certificates or other evidences of claims against assets of banking institutions, and (c) to authorize and direct the creation in such banking institutions of special trust accounts for the receipt of new deposits which shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separately in cash or on deposit in Federal Reserve Banks or invested in obligations of the United States.

"As used in this order the term 'banking institutions' shall include all Federal Reserve banks, national banking associations, banks, trust companies, savings banks, building and loan associations, credit unions, or other corporations, partnerships, associations or persons engaged in the business of receiving deposits, making loans, discounting business paper, or transacting any other form of banking business."

Proclamation of President of March 9, 1933, continuing Bank Holiday.

PROCLAMATION NO. 2040.

"WHEREAS, on March 6, 1933, I, FRANKLIN D. ROOSEVELT, President of the United States of America, by Proclamation declared the existence of a national emergency and proclaimed a bank holiday extending from Monday the 6th day of March to Thursday the 9th day of March, 1933, both dates inclusive, in order to prevent the export, hoarding or earmarking of gold or silver coin, bullion or currency, or speculation in foreign exchange; and

"WHEREAS, under the Act of March 9, 1933, all Proclamations heretofore or hereafter issued by the President pursuant to the authority conferred by section 5 (b) of the Act of October 6, 1917, as amended, are approved and confirmed; and

"WHEREAS, said national emergency still continues, and it is necessary to take further measures extending beyond March 9, 1933, in order to accomplish such purposes:

"NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, in view of such continuing national emergency and by virtue of the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. L. 411) as amended by the Act of March 9, 1933, do hereby proclaim, order, direct and declare that all the terms and provisions of said Proclamation of March 6, 1933, and the regulations and orders issued thereunder are hereby continued in full force and effect until further proclamation by the President."

REGULATION NO. 28 OF SECRETARY OF TREASURY. (March 18, 1933).

"After the close of business on March 18, 1933, Treasury Regulation No. 6 and Treasury Regulation No. 10, as amended, shall be without force or effect to authorize any banking transaction therein referred to."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

L 57-232

FREDERICK V. GOESS, as Receiver of THE HARRIMAN NATIONAL BANK AND TRUST COMPANY OF THE CITY OF NEW YORK,
Plaintiff

against

AUGUST HECKSCHER, *Defendant*

OPINION

This is a highly interesting case, and it is a matter of real regret that the pressure upon the court is such that an extended statement of my views cannot be made. However, after a careful consideration of the facts and the law, I entertain the belief that plaintiff's motion should prevail. The emergency in the country's banking system that presented itself in March of 1933, was such as to induce the President to proclaim the memorable bank holiday that marked his inauguration and to follow it with his executive order of March 10, 1933. I cannot but conclude that one of the purposes of the action then taken was to conserve the status of the banks within the national system, and to fix the right of their debtors and creditors as of the date of the proclamation, unless and until it should thereafter appear that, as of such date, a particular bank was in condition to be permitted to resume business. Unfortunately, that condition could not be exhibited by Harriman National Bank and Trust Company, and it never reopened. If, during the time that the bank was closed some persons, to the exclusion of others, could position themselves so as to be preferred creditors of the institution; it would be most unfair to depositors who could not withdraw their funds, and it would, also, serve to frustrate the purposes and intent of the Presidential proclamation and executive order. Hence the motion is granted.

JOHN C. KNOX, U. S. D. J.

12/1/34